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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 66

ESTATE OF HENRY H. ROGERS, deceased, ADRIAN H. LARKIN, ALBERT STICKNEY, and CENTRAL HANOVER BANK AND TRUST COMPANY, Executors,

Petitioners,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONERS

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I

This Court should not delete from the statute the stated requirement that property must *pass* under the exercise of a power to be taxable and substitute the respondent's "effective exercise" theory.

While the basic arguments made by Respondent in Point I of its Brief have been met in our main brief, certain statements seem to justify a summary appraisal.

Respondent states:

> "It is our position that the 'passing' requirement of the statute is satisfied where there is an *effective* exercise of the power." (p. 18).

This is an attempt to reduce what this Court in its *Grinnell* decision termed the "crucial words" of Section 302(f) to (1) the existence of a general power and (2) its exercise. It denies to "passing" any meaning other than what any reasonable reading of "exercise" would achieve. It conflicts with what this Court stated in the *Grinnell* case:

> "The tax here does not fall upon the mere shifting of the economic benefits in property, but upon the shifting of those benefits by a particular method —namely, by their '*passing* under a general power of appointment', and not otherwise. Acceptance of the Government's contention would strip the italicized word of all meaning." (294 U. S. 153, 156).

It also tends to ignore the fact that "the Courts have been at pains to consider whether property passed under a general power or not so as to be taxable under Section 302(f)", *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 62.

Respondent states concerning Section 302(f):

> "'Passing under' had no particular significance but was simply the best connecting phrase that readily occurred." (p. 21).

This assertion is directly contrary to the cases cited above and is without support. Nor is there any particular relevance to the various other matters discussed in Respondent's wholly theoretic development of Congressional intent in the premises (pp. 18-28). For example, it is interesting to note that Respondent feels constrained to look as far as English law on a distinctly different phase of the law of powers for support for his reading of the statute; indeed, he refers to a 1939 English decision as apparently intended to be relevant to what Congress intended in statutory language which first appeared in 1918.[1] The short answer is

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[1] See Respondent's Brief at page 28 for its reference to *In re Brook's Settlement Trusts* (1939) Ch. 993. The pertinent language of Section 302(f) first appeared in Section 402(e) of the Revenue Act of 1918, c. 18, 40 Stat. 1057.

that the legislative history sheds no light as to the intended meaning of "passing" (Petitioner's Main Brief, p. 6).

Respondent cites the *Hallock*[2] and *Clifford*[3] decisions of this Court to support the proposition:

> "The inquiry whether by local interpretation there is a 'passing' of property under the exercise of a power or under the instrument creating the power is precisely the type of question which has been banned from the interpretation of federal tax statutes by the recent decisions of this Court." (p. 32).

However, viewing those decisions as holding that substance rather than form must control in the interpretation of the federal tax statutes, the irreducible fact is that our view is in accord with their holding. Thus, as a matter of substance rather than form, no greater economic benefit shifted to decedent's widow and daughter than would have been shifted to them had he failed to exercise the power, which latter event was admittedly intended by Congress to be tax-free. Certainly, Respondent's argument that ". . . the failure of the instant appointees to renounce is decisive" (p. 41), looks only to form and ignores substance. In many cases, it would permit the determination of tax liability by the whim of the recipient of the property.

To seek, as does Respondent, to substitute an analysis of "quantitative" and "qualitative" changes of interest for the clear-cut one of whether or not the donee's will confers additional benefits upon the appointees (as compared to what they would take in default) is to prefer form to substance. This is so whether the answer to the question whether anything passed as a result of the exercise of the power is thought to be solely a federal question or one determinable under the state law.

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[2] *Helvering* v. *Hallock*, 309 U. S. 106.

[3] *Helvering* v. *Clifford*, 309 U. S. 331.

Indeed, it would be an anomaly in the law if a tax were not payable where the interests taken under the exercise of the power were the same as in default of exercise but a tax was payable where a lesser interest was so taken.

II

Under the applicable State Law no property passed to the wife and daughter of the decedent by reason of the exercise of the power.

Respondent (Brief, p. 51) takes the position that the State tax cases relied upon by Petitioners "are a poor vehicle for the determination of property law, since they involve public interests which rightly tend to obscure the precise distinctions which may be appropriate in adjudicating claims between individuals." We have shown in our main brief that entirely apart from any question of taxation the New York statutes and cases are clear as a matter of property law that the interest of a person designated to take in default of the exercise of a power of appointment is a vested interest. See *Matter of Chapman*, 133 App. Div. 337, aff'd. 199 N. Y. 562. That questions concerning such interests have arisen in cases involving taxes more frequently than in any other type of case does not in any way impair the conclusiveness of the authorities. The suggestion that the New York courts would announce one property rule in cases dealing with taxation and another in cases involving property rights seems baseless.

Also at page 51 of his brief, Respondent endeavors to buttress, by the citation of New York authorities, Judge Hand's holding in the court below to the effect that since the life estates appointed to decedent's wife and daughter were equitable and not legal, they must be included in the donee's estate for estate tax purposes. None of the cases cited by Respondent were relied upon by Judge Hand, or

support his determination. None use Respondent's phraseology of "quantitative" and "qualitative" changes of interest.

With respect to *Matter of Cooksey*, 182 N. Y. 92, the New York Court of Appeals in *Matter of Lansing*, 182 N. Y. 238, said (p. 247):

> "It, therefore, became necessary for the grandchildren to claim under the power of appointment as exercised by their mother in order to come into the possession of the largest sums mentioned at the ages named."

The *Cooksey* case is also cited by the New York Court of Appeals in *Matter of Duryea*, 277 N. Y. 310, 318, for the following proposition:

> "That an appointment to a stranger or an appointment through which the appointee takes benefits greater than would have accrued in the absence of an appointment is taxable in the estate of the donee of the power where the power is absolute is well established by authority. (*Matter of Cooksey*, 182 N. Y. 92; *Matter of Delano*, 176 N. Y. 486.)"

It is therefore clear that under the exercise of the power of appointment in the *Cooksey* case greater economic benefits passed to the appointees than they would have received had the power not been exercised.

In *Matter of Dows*, 167 N. Y. 227, aff'd sub nom. *Orr* v. *Gilman*, 183 U. S. 278, there was no contention made that the donee's sons received less under the exercise of the power than they would have otherwise and it clearly appeared that they received more. In *Matter of Rogers*, 71 App. Div. 461, aff'd 172 N. Y. 617, the appointee received the appointed estate outright under the exercise of the power of appointment, whereas in default of appointment he would have taken merely a life estate. Here again there was no contention made that the appointee received less under the exercise of the power. In *Matter of Warren*, 62 Misc. 444,

it appeared that under the will of the donor the four children of his son would have taken the estate equally if the power had not been exercised. Under the exercise, the wife of the donee was given a life interest and upon her death the principal was appointed to the donee's three sons to the exclusion of a daughter of the donee. The opinion does not reveal whether greater economic benefits passed to the three sons of the donee by the exercise of the power than they would have taken if the power had not been exercised, but it is reasonable to assume, in view of the facts, that greater economic benefits did pass by the appointment. The exact determination of the court in *Matter of Lowndes*, 60 Misc. 506, is not clear. The proceeding was evidently instituted to fix the New York transfer tax in the estate of the donor of the power, the donee having been a non-resident of New York. Although it was held that the children of the donee of the power took under their mother's will rather than under that of the donor of the power, a transfer tax was determined to be payable in the estate of the donor of the power. It is to be noted that the court relied upon the *Cooksey* case, but did not refer to the *Lansing* case nor to the statement of the Court in the *Lansing* case regarding the effect of the *Cooksey* case.

As to certain language contained in *Matter of Rynear*, 130 Misc. 804, and *Matter of Chapman*, 133 App. Div. 337, to which we assume the Respondent refers by his citation of those cases, it should be noted that the facts there before the courts did not require a determination as to the effect of an appointment of equitable estates where legal estates would have been taken in default of the exercise of the powers. Furthermore, it must be borne in mind that Surrogate Foley who decided *Matter of Rynear* had some years previously decided *Matter of Canda*, 114 Misc. 161, 164, in which he had found no difficulty in holding that interests which were qualitatively different under the exercise of a power than they would have been had the power not been exercised were not subject to tax.

It is significant in this connection that Respondent follows Judge Hand in the court below in disregarding (except to mention it in a footnote) the leading New York case of *Matter of Duryea*, 277 N. Y. 310, from which we have quoted extensively in our main brief. In that case the New York Court of Appeals said (pp. 318-319):

> "As has been suggested by the learned Surrogate in his opinion in this case, the true rule * * * may be stated to be that where a person named under the exercise of the power takes the same or less than he would have taken under the original Will, if the power of appointment had not been exercised, his interest is taxable in the estate of the donor and not in the estate of the donee."

The power of appointment provisions of the Internal Revenue Code as amended by the Revenue Act of 1942 (Section 811(f)(2)(A)) contain no reference to qualitative or quantitative estates but in a recent ruling of the Treasury Department by D. S. Bliss, Deputy Commissioner (Prentice-Hall Federal Tax Service par. 23,848), the following is set forth:

> "It is the opinion of this office that a power of appointment which is exercisable only in favor of persons or objects within the excepted class of the statute as referred to above properly falls within such excepted class if such power is exercised by creating a trust, in favor of the persons or objects within the excepted class."

However, if the Court should agree with Judge Hand that the equitable estates of decedent's widow and daughter must be included in his estate for estate tax purposes, there should nevertheless be excluded the value of the property appointed outright to the widow and daughter, viz.: $374,638.72.

III

The interest in the trust property remaining in the daughter was not as great as it would have been if the power had not been exercised.

Respondent asserts that the interest appointed to decedent's daughter is greater than the interest she would have taken had the power not been exercised, claiming that the Tax Court failed to take into account the value of the daughter's contingent interest in the principal of the widow's trust. As stated in our main brief, it is submitted that the value of the interests passing to decedent's daughter under the exercise of the power amounted in the aggregate to $1,954,324.32 and included the portion of the fund which she took outright and the value of her life interest in one-third of the fund less 6.667%. This is the value found by the Tax Court, which also found that the daughter's interest if the power had not been exercised would have amounted to $2,809,649.86. These values were not questioned by the Circuit Court of Appeals. To the value found by the Tax Court, Respondent has added the sum of $864,923.27, alleged to be the value of the daughter's remainder interest in the widow's trust. It is stated that this result has been obtained by using a factor to arrive at such value which is based on the likelihood mathematically of a person of the age of thirty-three years surviving a person of the age of forty-five years. In so doing, Respondent has entirely ignored the fact that decedent's daughter, even though she survives decedent's widow, may not be the only person to share in the remainder of the widow's trust. In Article Twelfth of his Will (R. 63) decedent provided that upon the death of his widow the principal of her trust should go to his "issue surviving her, except Henry, per stirpes and not per capita." Contrary to Respondent's contention, this language does not exclude from participation any children who may be born

to decedent's son Henry and who may survive the widow. This is specifically provided for in Article Fifteenth of decedent's Will (R. 69-70) where he stated that his son Henry was to be excluded from any remainder interest bequeathed to decedent's issue "as though he (Henry) had not survived me." This is a definite statement of decedent's intention not to exclude descendants of his son. Under these circumstances the cases cited by Respondent are meaningless.

Accordingly, any descendants of decedent's son will take an equal one-half share with decedent's daughter, if both survive the widow, of the remainder of the widow's trust. So far as is known it is impossible to compute the probability of the son having children who may survive the widow. If it were possible of mathematical computation, a factor taking into consideration this contingency should be used, instead of the factor employed on page 57 of Respondent's brief, which has not been stipulated and is not a part of the record.

Respondent further urges that since one-half of the principal of the widow's trust was to pass immediately to the daughter in the event of the widow's remarriage, the value of the daughter's appointed interest should be further increased and the value of the widow's appointed interest should be reduced so as to take into account the possibility of the widow's remarriage. It is clear that at the date of decedent's death the interest of the widow could only be reduced by her later remarriage and the interest of the daughter in the trust for the widow was conditioned upon such remarriage and upon the daughter then surviving. The law is well settled that the taxable status of decedent's property must be determined at the time of his death unaffected by any subsequent happening which does not relate back to the date of death.

Humes v. *U. S.*, 276 U. S. 487;
Ithaca Trust Co. v. *U. S.*, 279 U. S. 151;

George E. Farrington, et al., Executors, 13 B.T.A. 274, aff'd. 30 F. (2d) 915, cert. den'd 279 U. S. 873;
George W. Davison, Executor, 31 B.T.A. 101, aff'd. 81 F. (2d) 16;
Estate of Ida Simpson, 41 B.T.A. 157.

There is probably no known method of determining at decedent's death the value of the possibility of the widow remarrying, a contingency over which the widow alone had control.

Humes v. *U. S.*, 276 U. S. 487, 494.
Robinette v. *Helvering*, 318 U. S. 184.

It is submitted that the interest of the widow is as computed in our main brief and that the only interest of ascertainable value which the daughter received at the date of decedent's death is as set forth in our main brief. Accordingly, there would appear to be no necessity of remanding the case for further proceedings as suggested by Respondent.

Respectfully submitted,

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